90-274

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

TEAMSTERS LOCAL UNION NO. 776,
Petitioner,

v.

RITE AID CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In a case involving the enforcement of a labor arbitration award:

a. Whether the court abused its authority by substituting its judgment for that of the arbitrator who considered the merits of the underlying dispute?

b. Whether the court usurped the right of parties to a collective bargaining agreement to settle grievance disputes arising over the application or interpretation of their collective bargaining agreement by a mutually agreed upon method?

2. Whether an employer that voluntarily submitted to binding arbitration under a collective bargaining agreement and which failed to move to vacate an arbitration award rendered pursuant to that collective bargaining agreement should be estopped from attacking the arbitration award through NLRB procedure?

PARTIES

The parties to the proceeding in the court below were Teamsters Local Union No. 776 (Union), Petitioner herein, and Rite Aid Corporation (Employer), Respondent herein. The National Labor Relations Board submitted an Amicus Curiae Brief to the Court below.

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STATUTES

No. ____

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October Term, 1990

TEAMSTERS LOCAL UNION NO. 776,
Petitioner,

v.

RITE AID CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Teamsters Local Union No. 776, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this prodeeding on April 9, 1990.

OPINIONS BELOW

The memorandum opinion and order of the United States District Court for the middle District of Pennsylvania, dated September 29, 1989, appears in the Appendix at A-3 to A-10. The unreported Judgment Order of the Court of Appeals, dated April 9, 1990, appears in the Appendix at A-1 to A-2. The Court of Appeals Order, dated May 21, 1990, denying the Union's Petition for Rehearing *in banc* is unreported and is reproduced at A-13.

JURISDICTIONAL STATEMENT

The Court of Appeals denied the Union's Petition for Rehearing *in banc* on May 21, 1990. Jurisdiction of this Court is proper under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 203(d), Labor-Management Relations Act of 1947:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

STATEMENT OF THE CASE

The Union and Employer are parties to a collective bargaining agreement which regulates the terms and conditions of a specified unit of employees. See generally, App. at A-15. The Agreement provides that it shall be binding upon both parties and their respective successors and assigns. App. at A-15. The Agreement also provides for a final and binding resolution of labor disputes. Specifically, Article XI provides as follows:

> ARTICLE XI
> ADJUSTMENT MACHINERY
>
> Section 1.
>
> Any and all disputes, complaints, controversies, claims or grievances whatsoever between the Union or any employees and the Employer which arise under, out of, or in connection with, or are in any manner related to this Agreement, or the breach thereof, shall be adjusted as follows:
>
> (a) The employee involved and/or the Shop Steward shall discuss the grievance with his immediate foreman within forty-eight (48) hours after the grievance arises, *or after grievant becomes aware of the grievance*, excluding nonwork days.

(b) If not settled under Step (a) within three (3) working days after it arises, the grievance shall be immediately reduced to writing and taken up between the business representative and a representative of Management within five (5) working days.

(c) Grievances shall not be processed during working periods, except by mutual consent of the parties.

Section 2.

(a) The Employer will not discharge or suspend any employee who has completed his probationary period without just cause. In the event a grievance as defined herein is lodged which cannot be resolved satisfactorily through the grievance procedure set out in Section 1 above, either party shall have the right to request arbitration by notice to the other in writing within thirty (30) days after the grievance arises. It is further understood and agreed that the decision of the Union not to exercise its exclusive right to request arbitration shall be final and binding upon the employees.

(b) If the Union and the Employer are unable to agree upon the selection of an impartial arbitrator in seven (7) days, either may request the American Arbitration Association to appoint an arbitrator and conduct an arbitration proceeding in accordance with its rules.

(c) A decision of the arbitrator not inconsistent with the terms of this Agreement shall be final and binding upon the Employer, the Union and the Employees. and the Union. (sic)

In accordance with the provisions of Article XI of their collective bargaining agreement, the Union and Employer voluntarily submitted a grievance to final and binding arbitration. The dispute arose over the Employer's decision to transfer bargaining unit work out of the unit. Two bargaining unit employees filed grievances protesting their resulting loss of jobs. The Union also filed a grievance protesting these same matters. The Union asserted that the Employer had violated the recognition clause of the parties' collective bargaining agreement, App. at A-17; it demanded damages and make whole relief for all affected employees. The underlying facts of the dispute

are carefully set out in the arbitrator's decision and award. App. at A-18 — A-34.

The parties jointly selected an impartial arbitrator to decide the grievances. Both parties fully participated in the arbitration hearing. The arbitrator rendered his decision and award on July 14, 1988. The arbitrator held that the Employer had violated the recognition clause contained in the parties' collective bargaining agreement by transferring bargaining unit work out of the unit. The arbitrator ordered the Employer to make all the affected bargaining unit employees whole. App. at A-34. Significantly, the arbitrator expressly limited his decision to the interpretation of the parties' labor agreement. *See* App. at A-34.

The Employer refused to comply with the arbitrator's decision and award. Moreover, it failed to move to vacate the award pursuant to Pennsylvania law. In this regard, Pennsylvania requires that parties dissatisfied with an arbitration decision must move to vacate it within thirty days. 42 Pa.C.S.A. §7314(b), App. at A-35. The Employer has never moved to vacate the arbitrator's award pursuant to this statute.

Instead, after the arbitrator had rendered his decision and award, the Employer filed a petition for unit clarification with the National Labor Relations Board. The Employer sought a determination that the employees to whom the work at issue in the arbitration decision had been transferred were properly excluded from the bargaining unit. In a decision and order filed February 7, 1989, the Regional Director determined that those employees were excluded from the parties' collective bargaining agreement. The Union filed a request for review with the NLRB. The NLRB denied the request on April 28, 1989.

On January 5, 1989, while the NLRB's unit clarification determination was still pending, the Union filed a complaint with the United States District Court for the Middle District of Pennsylvania seeking a decree ordering the Employer to comply with the arbitrator's award. The parties filed cross motions for summary judgment. On September 29, 1989, the district court granted summary judgment in favor of the Employer and against the Union. In doing so,

the court dismissed the Union's complaint seeking to enforce the arbitrator's award.

Thus, the court refused to enforce the arbitrator's award. Contrary to the arbitrator's determination, the Court determined that the parties' underlying dispute involved a question of representation. Thus, the court framed the issue as follows:

> Which of two contrary positions is correct, that is, whether the Arbitrator's Award should be enforced, as is the position of the plaintiff Union, or whether the NLRB's decision should control, as is the position of defendant-Rite Aid.

See App. at A-6.

The District Court answered that question in favor of the Employer. The court held that the arbitrator had exceeded his authority by going beyond the parties' labor agreement. Curiously, the court found support for this holding on the arbitrator's expressed rejection of the need to address any questions of representation. *See* App. at A-8, n.6.

On October 25, 1989, the Union filed a Notice of Appeal. The United States Court of Appeals for the Third Circuit denied the appeal on April 9, 1990. Thereafter, the Union filed a Petition for Rehearing *in banc*. That petition was denied on May 21, 1990.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH WELL SETTLED DECISIONS FROM THIS COURT AND THE THIRD CIRCUIT.

It is well settled that courts play an extremely limited role in reviewing an arbitrator's decision. In the recent case, *Tanoma Mining Co. v. Local 1269*, 896 F.2d 745, (3rd. Cir. 1990), the United States Court of Appeals for the Third Circuit noted as follows:

> A district court is not free to vacate an award merely because it views the merits differently. *United Steelworkers of America v. Enterprise Wheel & Car*, 363 U.S. 593 (1960). This high level of deference is compelled by the preference for private

> resolution of labor disputes expressed in the federal statutes governing labor-management relations. *United Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987).
>
> Since the parties have bargained for the arbitrator's decision, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. *Misco*, 108 S.Ct. at 370.
>
> Despite this limited role in reviewing arbitration decisions, an award may be vacated in some circumstances. A court may vacate an arbitrator's award if it does not draw its essence from the collective bargaining agreement, but instead represents the arbitrator's 'own brand of industrial justice', *Enterprise Wheel*, 363 U.S. at 597. This exception is a narrow one.
>
> An arbitrator's award draws it essence from the bargaining agreement 'if the interpretation can *in any rational way* be derived from the agreement, viewed in the light of its language, its context and any other indicia of the parties' intention.'

896 F.2d at 747-748 (emphasis in original).

The Union emphatically maintains that the district court improperly substituted its judgment for that of the arbitrator whom the parties mutually selected to decide their contractual dispute. Specifically, in determining that the parties' labor dispute involved a question of representation under the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, the district court rejected the arbitrator's determination that the parties' underlying dispute involved only an alleged breach of contract. Even a cursory review of the arbitrator's well-reasoned decision establishes that the award draws its essence from the parties' labor contract. Indeed, the Union respectfully submits that it is beyond cavil that the arbitrator's interpretation can "in any way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention." *Tanoma*, 896 F.2d at 748 (3d Cir. 1990). Accordingly, the district court, not the arbitrator, exceeded its authority.

Had the district court properly adhered to its limited role in reviewing an arbitration decision, it would have been bound by the arbitrator's determination that the parties' underlying dispute involved only an alleged breach of contract. As a result, the district court would not have been confronted with choosing between seemingly inconsistent awards rendered from different forums.

The district court's purpose was quite clear and straightforward, namely to determine whether the arbitrator's award drew its essence from the parties' labor agreement. The district court went far astray from that limited purpose. The Third Circuit ratified the district court's impermissible expedition into areas well beyond its scope of review. Thus, the Third Circuit's decision is inconsistent with well settled precedent both of this Court and its own court. Accordingly, a Petition for Writ of Certiorari must issue in order to remedy such a decision that is completely inimicable with well settled precedent.

II. THE COURT USURPED THE RIGHT OF PARTIES TO A COLLECTIVE BARGAINING AGREEMENT TO SETTLE GRIEVANCE DISPUTES ARISING OVER THE APPLICATION OR INTERPRETATION OF THEIR COLLECTIVE BARGAINING AGREEMENT BY A MUTUALLY AGREED UPON METHOD.

The district court's ruling, as affirmed by the Third Circuit, effectively denies the Union of its right to enforce a fundamental contract provision contained in the parties' labor agreement through the grievance-arbitration procedure by which both parties agreed to be bound. In an effort to preserve and protect the employees' contractual rights, the Union filed a grievance alleging that the Employer had violated the recognition clause contained in the parties' labor agreement. An impartial arbitrator mutually selected by the parties sustained the grievance and ordered that the affected employees be made whole. In so ordering, the arbitrator upheld the Union's right to enforce every provision contained in the labor agreement.

The district court's ruling, as affirmed by the Third Circuit, effectively carves an exception out of that right. Specifically, the district court's ruling, as affirmed by the Third Circuit, requires the

Union to enforce work dispute grievances arising under the recognition clause of the labor agreement through a forum that is not of its own choosing.

As such, that ruling runs contrary to Section 203 (d) of the Labor-Management Relations Act, 29 U.S.C. §173(d), which declares that "final adjustment by a method agreed upon by the parties" is the "desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." Accordingly, the decision involves a question of such importance that a Petition for Writ of Certiorari must be issued in order to correct a ruling that is antithetical to long established federal policy concerning the private resolution of grievance disputes.

III. AN EMPLOYER THAT VOLUNTARILY SUBMITS TO BINDING ARBITRATION UNDER A COLLECTIVE BARGAINING AGREEMENT AND WHICH FAILS TO MOVE TO VACATE AN ARBITRATION DECISION RENDERED PURSUANT TO THAT COLLECTIVE BARGAINING AGREEMENT MUST BE ESTOPPED FROM ATTACKING THE ARBITRATION AWARD THROUGH NLRB PROCEDURE.

Regardless of whether the underlying facts of this case evidenced a contractual or representational issue, the district court and Third Circuit failed to consider an extremely important question that impacts upon the National Labor Relations Act's policy favoring the swift resolution of labor disputes. Specifically, the district court and Third Circuit failed to consider the ill effects of a decision which both approves and encourages a collateral attack of a final and binding arbitration decision to which the parties to the underlying dispute mutually agreed to be bound.

In this regard, the district court and Third Circuit ignored several crucial facts. Both courts ignored the fact that the Employer voluntarily submitted to final and binding arbitration of the three grievances from which this case originated. Both courts ignored the fact that the Employer never objected to the arbitrator's authority to decide the grievances. Both courts ignored the fact that the Employer petitioned the National Labor Relations Board for unit clarification only

after the arbitrator rendered his decision. Both courts ignored the fact that the Employer conceded that the work at issue in the arbitration decision was bargaining unit work and that its decision to transfer the work out of the unit was motivated solely by its own perceived economic interests. Finally, both courts ignored the fact that the dispute arose not out of a jurisdictional dispute between two competing unions claiming identical work for their own members, but rather out of the Employer's voluntary decision to transfer bargaining unit work out to lower paid, non-bargaining unit employees in direct violation of the recognition clause contained in the parties' labor agreement.

Had the courts below considered these facts, they would have realized that the Employer was merely attempting to circumvent its obligations under the labor agreement. Because they did not consider these facts, the courts below permitted the Employer to launch a successful collateral attack against a final and binding arbitration award. Such a collateral attack is antithetical to the federal labor statute's long established policy favoring the swift resolution of labor disputes. *See DelCostello v. Teamsters*, 462 U.S. 151 (1983).

The facts of this case require a holding that the Employer is estopped from collaterally attacking a final and binding arbitration decision through the misuse of NLRB procedure. *See Shaw v. Russel Trucking Line, Inc.* 542 F.Supp. 776 (W.D. Pa. 1982); *Local 542 v. Evans Asphalt Co.*, 721 F.Supp. 73 (M.D. Pa. 1989). The Employer voluntarily submitted to the grievance-arbitration procedure delineated in the parties' labor agreement. It did not raise objections to the arbitrator's authority to decide the case until after it received an unfavorable ruling. It never sought to vacate the arbitration award pursuant to 42 Pa.C.S.A. §7314(b). *See* App. at A-35. Quite literally, then, the Employer's conduct evidences a type of forum shipping that courts must not tolerate if they wish to uphold the federal labor statutes' policy favoring the swift resolution of labor disputes. *See DelCostello*, 462 U.S. 151 (1983).

In ignoring that federal policy, the district court and Third Circuit relied on this Court's decision in *Cary v. Westinghouse*, 375 U.S. 261 (1962). The employer in *Cary* faced a dilemma much different from that which the Employer in the instant case faced.

Specifically, the employer in *Cary* was caught in a jurisdictional dispute between two unions competing for the inclusion of certain job classifications in their respective units. The employer risked legal and economic consequences regardless of the position it assumed in the dispute. As a result, the employer properly refused to arbitrate the jurisdictional dispute because an arbitration decision would not necessarily bring the dispute to a swift and final conclusion. Instead, the employer petitioned the National Labor Relations Board for unit clarification.

The facts of the present case are quite different from those in *Cary*. Unlike the employer in *Cary*, the Employer in the instant case voluntarily submitted to final and binding arbitration. Moreover, the underlying dispute in the present case did not involve a jurisdictional war between two unions. Instead, the Employer created its own "dilemma" by willfully violating the parties' labor agreement.

In this regard, the Employer was not compelled to transfer bargaining unit work out of the unit to be performed by lower-paid personnel. Its decision was motivated solely by economics. In short, while the end result of the Employer's decision to transfer bargaining unit work out of the unit might have a surface similarity to *Cary* and its progeny, the fact remains that the "dilemma" in which the Employer assertedly found itself prior to the unit clarification order was entirely of its own making and particularly, of its willful violation of the labor agreement.

The Employer's petition for unit clarification served merely as a weapon by which to collaterally attack an adverse yet final and binding arbitration decision. The district court's decision, as affirmed by the Third Circuit, served not only as the path by which the Employer successfully circumvented its obligations under the contract, but also as an invitation for employers and unions alike to avoid similar obligations through the misuse of NLRB procedure and thereby undermine the federal labor statutes' policy favoring the swift resolution of labor disputes. The Union respectfully submits that if the decision by the district court, as affirmed by the Third Circuit, is permitted to stand, that decision will produce disastrous results for labor-management relations. Accordingly, the Union respectfully requests that this Honorable Court grant a Petition for Writ

of Certiorari in order to preserve the integrity of those labor-management relations and particularly of the crucial federal policy by which those relations are governed.

CONCLUSION

For all the foregoing reasons, the Union respectfully requests that this Honorable Court grant a Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel for Petitioner

Dated: 8/10/90

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5859

TEAMSTERS LOCAL UNION NO. 776,

Appellant

v.

RITE AID CORPORATION

NATIONAL LABOR RELATIONS BOARD,

Intervenor

Appeal from the United States District Court
for the Middle District of Pennsylvania (Scranton)
(D.C. Civil Action No. 89-0015)
District Judge: Hon. Edwin M. Kosik

Submitted Under Third Circuit Rule 12(6)
April 2, 1990

Before: HIGGINBOTHAM, *Chief Judge*,
and COWEN AND NYGAARD, *Circuit Judges*.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT

/s/ A. Leroy Higginbotham
Chief Judge

Attest:
/s/ Sally Mrvos
Sally Mrvos, Clerk

Dated: April 9, 1990

Costs taxed in favor of Rite Aid Corporation as follows:

TOTAL OF BRIEF $74.10

Certified as a true copy and issued in lieu
of a formal mandate on May 29, 1990.

Test:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of Appeals,
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 89-0015

TEAMSTERS LOCAL UNION NO. 776,

Plaintiff

v.

RITE AID CORPORATION

Defendant

Before: Judge Kosik

MEMORANDUM

This matter is before the court on the cross motions of the parties for summary judgment. There are also motions by the National Labor Relations Board [NLRB] to intervene and to dismiss. Briefs in support of and in opposition to the motions have been filed and the matters are ripe for disposition.

Background [1]

Defendant, Rite Aid Corporation [Rite Aid], and the plaintiff, Teamsters Local Union No. 776 [Union] are parties to a Collective Bargaining Agreement which regulates the terms and conditions of employment for a specified unit of employees. The Agreement contains a provision which allows either party to submit unresolved grievances to a labor arbitrator selected in accordance with the rules of the American Arbitration Association.

Rite Aid is engaged in the operation of a chain of several hundred retail drug stores throughout the eastern and southern United States. Its corporate offices are located in Shiremanstown, Pennsylvania, as are several other facilities that are part of its overall operation. Among these is a warehouse known as the central distribution center [CDC]. In addition to the Shiremanstown CDC, Rite Aid

1. The background information is a compilation taken from the Decisions of the Regional Director and the Arbitrator and the briefs of the parties.

operates five other similar facilities in other states. Each of these CDC's serve as a regional distribution/warehouse hub for a certain number of Rite Aid retail stores. Most, if not all, of the products sold by each retail store are initially received, stored, and subsequently distributed through their respective CDC. In addition, each CDC has performed certain functions in connection with the return of damaged or unsold goods from each of the retail stores.

Prior to a change in operation which occurred in August, 1987, each CDC performed all aspects of the returns work. In this regard, product returns were shipped back to the appropriate CDC of each retail store. Upon their receipt by the CDC, a three stage process was undertaken by the respective CDC employees whereby the returns were sorted and stored. In order for Rite Aid to obtain monetary credit for these goods, a representative of the vendor of each product would visit the CDC, inspect and inventory the returns, and subsequently advise Rite Aid whether such goods should be destroyed or shipped back to the respective vendor or producer. At the Shiremanstown CDC, the complete returns function was undertaken in a specific location of the warehouse facility.

In 1987 Rite Aid elected to centralize the "returns work" into one facility in Shiremanstown. Additional warehouse space was obtained in a building near the Shiremanstown CDC where a subsidiary corporation of Rite Aid also leased space. This subsidiary corporation, Warehousing Rite Aid Cigarette Division [WRAC] performs warehousing for cigarettes and video tape. The employees of WRAC are not represented by any labor organization.

Commencing in August, 1987, all returns, after preliminary sorting and separation was done at the respective CDC's, including the Shiremanstown CDC, were shipped to a newly established Central Returns Warehouse [CRW]. At the CRW, the final two stages of the returns process were undertaken for all CDC's in Rite Aid's operation. To accomplish this task, approximately twenty-seven [27] employees were hired by Rite Aid for the CRW through the normal employment application process. No employees were transferred from the Shiremanstown CDC to the CRW nor were any layoffs occasioned by this change. However, those employees in the CDC

who had been performing the now-removed returns work were transferred to other positions within the CDC.

Grievances were filed by employees who had been transferred out of returns, protesting the transfer of bargaining unit work to non-union employees. Other grievances were filed for reasons arising out of the same circumstances. These grievances were not resolved through the lower steps of the grievance procedure and were ultimately heard by an Arbitrator. The Arbitrator, who issued his Decision and Award on July 14, 1988, sustained the Union's grievances finding violations of the parties Collective Bargaining Agreement by Rite Aid's failure to apply the Agreement to those employees hired in the CRW.

Rite Aid subsequently filed a petition for unit clarification with the National Labor Relations Board [NLRB]. In a Decision and Order filed February 7, 1989, the Regional Director determined that the collective bargaining unit excludes all employees in the CRW in Shiremanstown, Pennsylvania. The Union filed a request for review with the NLRB, who denied the request for review on April 28, 1989.[2]

On January 5, 1989, the plaintiff Union filed a complaint with the court seeking a decree ordering and directing defendant Rite Aid to comply with the Award of the Arbitrator. Plaintiff also seeks damages, counsel fees, and costs. An answer to the complaint was filed by defendant on March 6, 1989.[3] Cross motions for summary judgment were filed by the parties with appropriate briefs. Additionally, a motion for leave to intervene and a motion to dismiss the proceeding were filed by the NLRB on June 29, 1989. A memorandum of law in support of the NLRB's motions was also filed on June 29, 1989.

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2. Subsequent to the denial of the Union's request for review, several other matters were presented by the parties to the NLRB. However, we do not find these subsequent activities to be pertinent to the instant determination.

3. A default entered in favor of the plaintiff on February 21, 1989, was set aside by stipulation filed March 1, 1989.

Discussion

The issue that this court must decide is which of two contrary positions is correct, that is, whether the Arbitrator's Award should be enforced as is the position of the plaintiff-union or whether the NLRB's decision should control as is the position of the defendant Rite Aid. For the reasons which follow, we must agree with defendant Rite Aid that the decision of the NLRB should control in these circumstances.

It is not disputed that in federal labor law, a judicial review of an arbitrator's decision on a collective bargaining agreement is limited. As long as the award draws its essence from the collective bargaining agreement, the award generally should be affirmed. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). However, if the arbitration award is inconsistent with public policy or violates a specific command of the National Labor Relations Act, the award may be vacated. *Arco-Polymers, Inc. v. Local 8-74*, 671 F.2d 752, 754 (3d Cir. 1982).

Further, in *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261, 272 (1964), a representation case, the Supreme Court held that:

> Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under §301. . . .
>
> . . .
>
> . . .The superior authority of the Board may be invoked at any time. . . .

Keeping *Carey, supra* in mind, we will examine the Decision and Order of the Regional Director of the NLRB. In particular, the decision of the NLRB states that Rite Aid was seeking clarification of the contractual bargaining unit of employees currently represented to exclude those employees hired and employed in the CRW as part

of a functional reorganization.[4] Recognizing the Decision and Award of the Arbitrator, the Regional Director referred to the Board's well settled policy of refusing to defer to an arbitrator's decision in determining questions of representation, accretion, or appropriate unit citing *Pinkerton's, Inc.*, 270 NLRB 27 (1984) and *Williams Transportation*, 233 NLRB 839 (1977). Thus, he refused to defer to the Arbitrator's Decision and Award in regard to the representational status of the CRW employees.

After analyzing the facts presented, the Regional Director concluded that the CRW facility was a different operation from the CDC facility. Thus, it was appropriate to clarify the bargaining unit to exclude the employees of the CRW.

Specifically, it was found that no CDC employees were transferred to the CRW, and although the nature of the "returns" work function was unchanged, a substantial portion of that work was relocated from the Shiremanstown CDC, as well as other CDC's of Rite Aid to the CRW. No Unit employees were laid off or had their hours of work reduced because of the transfer of the returns work. Further, the CRW was established to perform a separate and independent function of Rite Aid's operation. While it was undisputed that the function had previously been performed at the various CDC's, including the Shiremanstown CDC, Rite Aid concluded for both logistical and financial reasons that the function should be centralized. Rite Aid's reorganization was that of a consolidation of a relatively small function of each CDC into a centralized facility.[5]

---

4. The Agreement (Article II) defines bargaining unit as follows:

The bargaining unit covered by this Agreement consists of all warehouse employees, carpenters, and truck drivers, including step-in van drivers, over-the-road drivers, employed by Rack-Rite Distributors Division, Rite Aid Corporation, at its Shiremanstown, Pennsylvania, operation; but excluding salesmen, office clerical employees, professional employees, guards and supervisors as defined in the Act, and all employees at the Employer's other warehouse locations.

5. The Regional Director also found that even if the action were analyzed under the accretion doctrine, as opposed to the relocation doctrine, the CRW would not constitute an accretion to the Shiremanstown CDC.

The plaintiff argues that the case before the Arbitrator did not involve a representational issue, but rather was decided on contractual grounds, namely an interpretation of the Collective Bargaining Agreement. Thus, plaintiff argues that *Carey v. Westinghouse, supra*, and its progeny, which hold that an NLRB ruling takes precedence over the decision of an arbitrator in a representation case, is inapplicable.

We disagree with plaintiff's assertions and find that the instant action involves a representational issue. *See N.L.R.B. v. Paper Manufacturers Co.*, 786 F.2d 163 (3d Cir. 1986). Further, we believe that the Arbitrator's Decision goes beyond interpreting the Collective Bargaining Agreement, thereby exceeding his authority.[6] Accordingly we will ~~grant the~~ defendant's motion for summary judgment and will dismiss the plaintiff's complaint.

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6. In particular, we refer to the following excerpt in the Arbitrator's decision:

The Company's claim that to sustain the grievance in this case would be inconsistent with the National Labor Relations Act since there was no evidence that the CRW returns work was an appropriate separate bargaining unit is rejected. First, I am not persuaded that this Arbitrator needs to determine whether the CRW return work constituted a separate appropriate bargaining unit in order to resolve this grievance and apply the terms of Article II. The question contractually is not whether the remaining employees in the Lehrman building who work for WRAC could possibly be part of a bargaining unit which included the CRW returns employees, but excluded the CDC employees. Rather, to the extent that appropriate bargaining unit questions impact at all on the application of Article II (an issue which need not be addressed herein), the question, at best, is whether a bargaining unit which included the CRW returns employees with the CDC employees, but excluded the WRAC employees, could be considered an appropriate unit. On the basis of this record, and after consideration of the traditional community of interest standards used by the NLRB in such cases, there is no question in my mind that the answer to the latter question is in the affirmative.

Nor am I persuaded that an Award directing that the Company honor its Agreement with the Union and apply the terms of that Agreement to the returns work being performed at the Lehrman building would violate the Section 7 NLRA rights of any of the unorganized CRW employees. The application of lawful union security provisions (Article III) to newly hired members of a bargaining unit is not a violation of the Section 7 rights of those newly hired employees.

Finally, we have before us a motion for leave to intervene and a motion to dismiss the proceeding filed by the NLRB. Because the issues and authorities raised by the NLRB in their motions and supporting memorandum of law and the relief requested therein are basically the same as those raised by the defendant and because we have already determined that the defendant's motion for summary judgment should be granted, we will deny the NLRB's motion for leave to intervene.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TEAMSTERS LOCAL UNION NO. 776	:	
Plaintiff	:	
vs.	:	CIVIL NO. 89-0015
	:	(Judge Kosik)
RITE AID CORPORATION	:	
Defendant	:	

ORDER

NOW, THEREFORE, this 29th day of September, 1989, IT IS HEREBY ORDERED THAT:

[1] the defendant Rite Aid Corporation's motion for summary judgment is granted;

[2] the plaintiff Teamsters Local Union No. 776's motion for summary judgment is denied;

[3] the plaintiff's complaint is dismissed;

[4] judgment is entered in favor of the defendant and against the plaintiff;

[5] the motion of the National Labor Relations Board [NLRB] for leave to intervene is denied; and

[6] the Clerk of Court is directed to close this case.

/s/ Edwin M. Kosik
Edwin M. Kosik
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TEAMSTERS LOCAL UNION NO. 776	:	
Plaintiff	:	
vs.	:	CIVIL NO. 89-0015
	:	(Judge Kosik)
RITE AID CORPORATION	:	
Defendant	:	

NOTICE OF APPEAL

Notice is hereby given that Teamsters Local Union No. 776, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of the Honorable Edwin M. Kosik, entered in this action on the 29th day of September, 1989, granting Defendant's Motion for Summary Judgment, denying Plaintiffs Motion for Summary Judgment, and dismissing Plaintiff's Complaint.

Respectfully Submitted,

IRA H. WEINSTOCK, P.C.
800 North Second Street
Harrisburg, Pennsylvania 17102
Phone: 717-238-1657

By: /s/ Ira H. Weinstock
IRA H. WEINSTOCK

By: /s/ Walter H. DeTreux, III
WALTER H. DeTREUX, III

Certified from the record
Date 10-27-89
Donald R. Berry, Clerk

Per /s/ Barbe H. Sempa
Deputy Clerk

CERTIFICATE OF SERVICE

AND NOW, this 25th day of October, 1989, I, Walter H. DeTreux, III, Esquire, attorney for the Plaintiff, Teamsters Local Union No. 776, hereby certify that I served the within NOTICE OF APPEAL this day by depositing the same in the United States mail, postage prepaid, in the post office at Harrisburg, Pennsylvania, addressed to:

By First Class Mail:

Bruce Bagley, Esquire
McNEES, WALLACE & NURICK
100 Pine Street
P.O. Box 1166
Harrisburg, Pennsylvania 17108

By: /s/ Walter H. DeTruex, III
WALTER H. DeTREUX, III

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5859

TEAMSTERS LOCAL UNION NO. 776,
Appellant

v.

RITE AID CORPORATION

NATIONAL LABOR RELATION'S BOARD,
Intervenor

SUR PETITION FOR REHEARING

Before: HIGGINBOTHAM, *Chief Judge;* SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ R. E. Cower
Circuit Judge

Dated: May 21 1990

AGREEMENT

BETWEEN

RITE AID CORPORATION

RACK-RITE DISTRIBUTORS DIVISION

AND

CHAUFFEURS TEAMSTERS AND HELPERS

Local Union No. 776

Affiliated with:

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

AUGUST 1, 1987

AGREEMENT

THIS AGREEMENT made and entered into this 1st day of August, 1987, by and between RACK-RITE DISTRIBUTORS DIVISION, RITE AID CORPORATION, hereinafter designated as the Employer, and TEAMSTERS LOCAL NO. 776, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, hereinafter designated as the Union, for and in behalf of itself and the employees now employed or hereafter to be employed by the Employer.

WITNESSETH:

WHEREAS, the workers employed by the Employer have duly designated the Union as their exclusive bargaining representative for the purpose of collective bargaining with the Employer with respect to rates of pay, wages, hours and other conditions of employment; and

WHEREAS, the parties desire to cooperate in establishing conditions which will tend to secure a living wage, improved working conditions and fair competition insofar as labor cost is concerned, and to provide methods for a fair and peaceful adjustment of all disputes that may arise between the parties;

NOW, THEREFORE, in consideration of the mutual promises and obligations herein assumed and contained, and other good and valuable considerations, the parties agree as follows:

ARTICLE 1

MUTUAL OBLIGATIONS

The parties agree that this Agreement shall be binding upon them and their respective successors and assigns.

ARTICLE XI

ADJUSTMENT MACHINERY

Section 1.

Any and all disputes, complaints, controversies, claims or grievances whatsoever between the Union or any employees and the

Employer which arise under, out of, or in connection with, or are in any manner related to this Agreement, or the breach thereof, shall be adjusted as follows:

(a) The employee involved and/or the Shop Steward shall discuss the grievance with his immediate foreman within forty-eight (48) hours after the grievance arises, *or after grievant becomes aware of the grievance*, excluding non-work days.

(b) If not settled under Step (a) within three (3) working days after it arises, the grievance shall be immediately reduced to writing and taken up between the business representative and a representative of Management within five (5) working days.

(c) Grievances shall not be processed during working periods, except by mutual consent of the parties.

Section 2.

(a) The Employer shall not discharge or suspend any employee who has completed his probationary period without just cause. In the event a grievance as defined herein is lodged which cannot be resolved satisfactorily through the grievance procedure set out in Section 1 above, either party shall have the right to request arbitration by notice to the other in writing within thirty (30) days after the grievance arises. It is further understood and agreed that the decision of the Union not to exercise its exclusive right to request arbitration shall be final and binding upon the employees.

(b) If the Union and the Employer are unable to agree upon the selection of an impartial arbitrator in seven (7) days, either may request the American Arbitration Association to appoint an arbitrator and conduct an arbitration proceeding in accordance with its rules.

(c) A decision of the arbitrator not inconsistent with the terms of this Agreement shall be final and binding upon the Employer, the Union and the employees.
and the union.

ARTICLE II

UNION RECOGNITION

The bargaining unit covered by this Agreement consists of all warehouse employees, carpenters, and truck drivers, including step-in van drivers, over-the-road drivers, employed by Rack Rite Distributors Division, Rite Aid Corporation, at its Shiremanstown, Pennsylvania, operation; but excluding salesmen, office clerical employees, professional employees, guards, supervisors as defined in the Act, and all employees at the Employer's other warehouse locations.

In the Matter of Arbitration:

RITE AID CORPORATION	: AAA Case No. 14
	: 300 1977 87 Q
and	: Grievance Nos.
TEAMSTERS LOCAL UNION	: 6204, 7590 and 9834
NO. 776	: Transfer of Returns Work

Before: Ira F. Jaffe, Impartial Arbitrator

APPEARANCES:

For the Union:

Ira H. Weinstock, Esq.
Walter H. DeTreux, III, Esq.
(Ira H. Weinstock, P.C.)
John L. Fogle, II, Business Agent
Richard A. Brown, Sr., Steward
Dale Ramp, Steward

For the Company:

Norman I. White, Esq.
(McNees, Wallace & Nurick)
Robert R. Souder, Senior Vice-President, Personnel
Ronald A. Miller, Senior Vice-President, Distribution
Robert E. Montfort, Distribution Center Manager

BACKGROUND

This case arises out of the Company's decision to transfer certain "returns" work from its Rack Rite Central Distribution Center ("CDC") and from other regional distribution centers to a newly created division — Central Returns Warehouse ("CRW"). The CRW and the CDC are located across the street from one another in Shiremanstown, Pennsylvania. The CRW, which is located in the Lehrman building, employees non-union, non-bargaining unit employees, to perform the transferred returns work. The Company's WRAC division, which warehouses the Company's cigarette and video

products, also subleases space in the Lehrman building from a third party, RWP. The record was somewhat unclear as to whether CRW was a division of WRAC (which, in turn, is wholly owned by Rite Aid) or is itself a recognized division within Rite Aid.

The parties stipulated that returns work has been performed at the CDC for at least the past 21 years and that the Union became the bargaining representative of employees working at the CDC in about 1966 or 1967.

The instant three grievances protest the Company's actions and seek a finding that the returns work performed at the CRW building be declared bargaining unit work covered by the Agreement and that the Company be directed to make whole all affected employees.

Rite Aid owns and operates in excess of 2,200 retail drug stores across the country and employs in excess of 28,000 employees. During 1987, the Company grew significantly, in part due to the acquisition of 550 stores which previously were part of the Super X or Gray Drug Fair drug store chains.

The Company's first distribution center was located in Shiremanstown. Over the years, as the Company has grown both in size and in the geographic regions in which stores are located, additional distribution centers have been built. The six distribution centers in operation as of the time of the grievance were the CDC in Shiremanstown (which serviced 435 of the Company's stores in the Mid-Atlantic area); Rome, New York; Nitro, West Virginia; Cleveland, Ohio; Columbia, South Carolina; and Melbourne, Florida. Each of the distribution centers is a separate bargaining unit. Some employees working at the Rome, Nitro, and Cleveland distribution centers are represented by various locals of the Teamsters Union; the Columbia and Melbourne operations are non-union. Some of the Company's retail stores are organized; others are not.

Due to the nature of the Company's business, there are constantly items which need to be returned to its vendors for appropriate credit. Initially, when the Company was smaller and Shiremanstown was its only distribution center, all of the Company's returns were handled by Shiremanstown bargaining unit employees. Later, as the regional distribution centers were created, returns were regional

ized. No grievances were filed by the Union at Shiremanstown alleging that the transfer of returns work from Shiremanstown to the newly created regional distribution centers violated the terms of the then applicable labor agreement.

Prior to the events which led to the grievances in this case, returns facilities were established at each of the regional distribution centers to handle merchandise which was returned from the stores. On occasion, returns work from other regions was handled at the CDC. Ronald A. Miller, Senior Vice-President, Distribution, testified that the returns work performed at the CDC from the regions prior to August, 1987, was limited to overflow work. Dale Ramp, a Warehouseman who has worked at the CDC for 9½ years and who has been a Steward since March, 1988, testified that merchandise was routinely received from both stores and other distribution centers at the CDC for processing and that nobody ever told the employees that the returns work sent from other distribution centers was "overflow" work.

Mr. Miller testified that, as part of the Company's 1987 acquisitions, the Company elected to reorganize the returns process. Mr. Miller also noted that the Company borrowed this approach from one of the acquired concerns. Specifically, Mr. Miller explained that it often is difficult to persuade manufacturers' representatives to travel to a number of regional locations to authorize returns; that, accordingly, all returns work was brought back to a single, centralized location; and that, prior to permitting any purchase order to be issued, the vendor is first required to handle all of its returns and obtain written clearance from the returns area to that effect. Rite Aid's corporate offices are housed in the CDC building.

With the expansion of the Company's operations, the returns area in the CDC became too small to perform all needed returns work. As noted earlier, in or about August, 1987, the Company moved part of the returns work to leased space in the Lehrman building. At or about the same time, the Company moved its WRAC cigarette and video distribution center into a portion of the Lehrman building from another building near the Shiremanstown CDC complex. The cigarette and video distribution center has historically been operated non-union. The Union has not lodged any claim that the cigarette

and video work was within the jurisdiction of the CDC bargaining unit. Walls physically separate the CRW area from the cigarette and video areas. Mr. Miller testified that 11 employees work in cigarettes, 6 employees work in video, and that the cigarette and video areas have separate supervision from the returns area. Mr. Miller testified that inventory control is centralized for all of the Company's distribution centers, including both CDC and CRW, under the direction of Richard Kenzie; that WRAC's video operations were four years old and were never covered by the CDC Agreement; and that cigarettes have never been covered by the CDC agreement. CRW employees are employees of Rite Aid and, as such, are able to use the cafeteria and other facilities available in the main CDC building.

RWP, an independent third concern not associated with Rite Aid which subleased space to WRAC, also conducts business in the Lehrman building.

Mr. Ramp testified that there were rumors in or about June, 1987, that the Company was going to move part of the returns work to the Lehrman building; that he understood the need for additional space and asked his supervisor, Jim Shade, what was happening; the Mr. Shade replied that he didn't know; the he (Ramp) saw no reason to investigate or question the Company in negotiations about the matter because he assumed that the work would remain in the bargaining unit and because he trusted the Company; that collective bargaining negotiations for a new agreement took place in June and July, 1987; that, about the third week in August, the Company informed three employees that they would no longer be used to perform return work; that part of the returns work was thereupon transferred across the street to the CRW; that the employees at the CDC working on returns declined from about 18 to about 11 in number as a result of the transfer of work to CRW; that none of the CDC returns employees were offered the opportunity to transfer across the street to follow the work; and that the Company elected to operate the CRW on a non-union basis.

Mr. Miller acknowledged that the Company knew, prior to the completion of negotiations, that it planned to move a portion of the returns work to the Lehrman building and assign the work, on a non-union basis, to CRW, but that the Company never brought that

fact to the Union's attention during negotiations.

Prior to the August, 1987 changes in the allocation of returns work, CDC bargaining unit employees sorted all returns alphabetically by vendor (stage 1) and stored the returns in holding bays. Then, the returns were set up at tables for examination by representatives of the manufacturer (stage 2). Finally, the returned goods were repacked and processed for return shipment to the vendor or manufacturer (stage 3). Bargaining unit employees working on returns also were required to complete a variety of paperwork and to obtain control numbers from Accounts Payable.

Subsequent to the August, 1987 changes, stage 1 work was retained in the CDC, stage 2 and 3 work was transferred to the CRW. Even after the change, however, when returns work got backlogged at the CRW, the Company reassigned some stage 2 and 3 returns work to CDC bargaining unit employees.

Prior to August, 1987, Dave Thomas worked as the night shift supervisor in receiving at the CDC. Upon the opening of the CRW, he was reassigned to direct the CRW operations. Mr. Ramp testified that, following August, 1987, Mr. Thomas works at both the CDC and CRW, traveling back and forth a number of times each shift to confer with CDC personnel and with various office personnel, particularly those in Purchasing. Mr. Thomas, has been supervised directly by Robert E. Monfort, Warehouse Manager at the CDC, both during the time that he (Thomas) worked at the CDC and after the creation of CRW.

Following the creation of the CRW and the transfer of returns work, the stage 1 sorted returns goods are transported from the CDC to the CRW by bargaining unit employees in Company vehicles.

The amount of returns work expanded greatly in or about August, 1987. This is reflected in the number of employees assigned to work in returns (27 in CRW and 11 in CDC). Mr. Miller explained that with the acquisition of stores which formerly were part of Super-X and Gray Drug Fair chains, the Company assumed inventory containing large numbers of products which the Company did not sell and that, as a result of that fact, combined with the substantial increase in the number of stores overall and the centraliza-

tion of returns in Shiremanstown, returns in Shiremanstown more than doubled when compared with the prior year.

The record contained reference to Rite Aid Corporation, Rack Rite Distributors, CRW, and WRAC. It appears that each of the Company's distribution centers is a separate corporation and that WRAC, which handles the cigarette and video products, also is a separate corporation. Mr. Miller testified that CRW is, from a corporate perspective, part of WRAC. He also acknowledged, however, that all of the various corporations are wholly owned divisions of Rite Aid. The Agreement in this case identifies the Employer as "Rack-Rite Distributors Division, Rite Aid Corporation." Mr. Ramp testified that "Rack-Rite" was the name used a number of years ago by a parent company of the CDC and Rite Aid operations.

The record reflected that applicants for employment at Shiremanstown applied at the Company's central personnel office, and following completion of the employment application and interview, were offered employment in either CRW or CDC, presumably dependent upon the Company's needs at the time and the applicant's qualifications. There was no dispute that employees in the bargaining unit receive pay rates which, as of August, 1987, ranged from $7.73 to $10.76 per hour (employees of very short service and temporary employees receive less than the full job rate for limited periods); by contrast, employees at CRW were paid $4.50 per hour. Both CRW employees and CDC employees receive the same benefits; the retirement and health insurance programs for both employee groups are Rite Aid corporate sponsored programs.

Anne Bye, a former employee at CRW, testified that her pay checks were from Rite Aid Corporation, not CRW. Mr. Miller testified that, although the check stub showed it to be a Rite Aid Corporation check, the computer used a single check stock for CRW and CDC, with the division typed by computer on the check itself. The record was held open, following the April 14, 1988 hearing, to introduce a copy of a canceled check itself corroborating this claim by Mr. Miller. No such corroboration, however, was ultimately submitted by the Company.

There was no dispute that no CDC employee suffered any loss of hourly rate or change in classification as a result of the disputed transfer of work in this case.

In addition to the changes grieved herein, a number of the Company's stores have changed over to a pre-sorting of returns merchandise in the retail stores. With the introduction of new universal product code ("UPC") dependent equipment, pricing work performed by CDC employees has declined recently and will be expected to decline further in the future.

RELEVANT PROVISIONS OF THE AGREEMENT

Article I — *Mutual Obligations*, provides that:

The parties agree that this Agreement shall be binding upon them and their respective successors and assigns.

Article II — *Union Recognition*, provides that:

The bargaining unit covered by this Agreement consists of all warehouse employees, carpenters, and truck drivers, including step-in van drivers, over-the-road drivers, employed by Rack Rite Distributors Division, Rite Aid Corporation, at its Shiremanstown, Pennsylvania, operation; but excluding salesmen, office clerical employees, professional employees, guards, supervisors as defined in the Act, and all employees at the Employer's other warehouse locations.

Article V — *Management Rights*, provides that:

The parties agree that subject to the limitations imposed by this Agreement and state and federal law, the management of the plant and direction of the working force is vested exclusively in the Company, including but not limited to, the right to schedule work; to assign work and working hours to employees. . . .

Article XXIII — *Temporary Employees* permits the hiring of temporary employees under certain conditions at lower pay rates and for limited time periods.

Article XXIV — *Bargaining Unit Work*, provides that:

Supervisory employees shall not perform bargaining unit work, except as may be required in training new employees or during an emergency.

Article XXX — *Subcontracting*, provides that:

The Employer shall have the right to subcontract work, provided that such subcontracting shall not produce a job loss to any employee then on the payroll.

CONTENTIONS OF THE UNION

The Union recognized that, if the Company's actions are viewed as subcontracting, then the instant grievances must be denied since admittedly no loss of jobs has occurred. The actions protested herein by the Union, however, do not constitute subcontracting.

There has been no transfer of work on a contracting out basis to an outside independent employer. Rather, the record evidence reveals that Rite Aid is the true employer and thus both CRW and Rack Rite are one and the same employer for labor realtions purposes. If the Arbitrator were to consider the Company's claim that CRW is a separate corporation, however, the fact remains that the record more than supports the Union's claim that CRW and Rack Rite are *alter egos*. When viewed in this light, what the Arbitrator is presented with is an attempt by the Company to evade the Agreement, pay employees far lower wages than are called for by the Agreement, and avoid the restrictions on managerial discretion contained in the Agreement, by assigning work to a newly created non-union, wholly owned subsidiary. For years, that work has been performed by the bargaining unit and, even after the creation of CRW, still is assigned to the bargaining unit as well as to CRW employees.

The federal courts and the National Labor Relations Board ("NLRB" or "Board") have had occasion to examine many factual situations in determining whether two or more employers constitute a single employer, for labor relations purposes. In *Radio &*

Television Broadcast Technicians, Local Union 1264, IBEW v. Broadcast Service of Mobile, Inc., 380 U.S. 255 (1965), the United States Supreme Court in a per curiam opinion in a pre-emption case found that the operations of several companies needed to be combined for purposes of applying the Act's jurisdictional standards. In analyzing the facts in that case, the Court stated that:

> . . .[I]n determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise and integrated enterprise. The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.

Id. at 256 (citations omitted).

Applying these factors in this case, there can be no question that Rite Aid's CDC operations and its CRW operations are operations of a single employer. The facts herein demonstrate common ownership — CRW, CDC, and WRAC, are all 100% owned by Rite Aid. The record revealed centralized control over labor relations. Both CRW and CDC are subject to common benefits and labor relations policies. Robert R. Souder, Senior Vice-President, Personnel, for Rite Aid, has labor relations responsibility for both CRW and CDC. Pay checks are issued by Rite Aid and hiring is consolidated, with identical application forms used. Organizationally, both CRW and CDC are also under common management. Mr. Miller and Mr. Kenzie supervise and are responsible for the CDC and CRW facilities. The work of Mr. Thomas, who came from CDC, and the nature of the work itself establishes clearly that the returns work performed at CDC and the returns work performed at CRW are integrated and located very close to one another.

Alternatively, even if the Arbitrator is not inclined to find that CRW and Rack Rite are a single employer, he still should conclude that the two employers are *alter egos* for labor relations purposes. The United States Supreme Court in *Howard Johnson Company, Inc. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees*, 417 U.S. 249 (1974), stated that:

> It is important to emphasize that this is not a case where the successor corporation is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the old employer." Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the labor laws, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor.

Id. at 259 n.5 (citations omitted).

In its post-hearing brief, the Union referenced the following Board and Court of Appeals decisions, all of which were carefully read and reviewed by the Arbitrator, but which need not be summarized herein in any detail:

Alkire v. NLRB, 716 F.2d 1014 (4th Cir. 1983);
NLRB v. Scott Printing Corp., 612 F.2d783 (3d Cir. 1979);
NLRB v. O'Keefe & Merritt Mfg. Co., 178 F.2d 445 (9th Cir. 1949);
Dahl Fish Company, 279 NLRB No. 150 (1986);
Advance Electric, Inc., 268 NLRB 1001 (1984);
Republic Engraving and Designing Co., 236 NLRB 1150 (1978);
Appalachian Construction, Inc., 235 NLRB 685 (1978);
Crawford Door Sales Co., Inc., 226 NLRB 1144 (1976); and
P.A. Hayes, Inc., 226 NLRB 230 (1976);

According to the Union, although the *Alkire* case suggests that anti-union motive or an intention to evade the agreement is required prior to finding *alter ego* status, a number of other cases considered the question of employer motivation as simply one factor for consideration in determining single employer and/or alter ego status. The Union maintained that, under either legal standard, the facts in this case warrant a finding of single employer and alter ego status. In this regard, the Union asserted that a foreseeable benefit to the Company of evading the agreement may be imputed to the Company based upon the Company's refusal to respond to questions posed by the Union prior to the move, the Company's failure to have raised

the issue during negotiations, and the acceptance of the obvious economic benefits to the employer of paying less than contractual wages to the non-union CRW workers.

The Company's comparison of the instant transfer of work to the elimination of pricing due to the introduction of the UPC's is misplaced. The Union could not attempt to follow work which has been eliminated. In the instant case, the work was moved a few hundred feet, but otherwise remained in existence in substantially the same form that it has existed for years. Similarly, the instant case is distinguishable from the move of returns (and other work) to regional distribution centers or to retail stores. The Agreement expressly prohibited the Union from following the work to other legitimate warehouse locations. Further, the Union recognizes that its jursidiction is not world-wide. In this case, the evidence clearly showed that the returns work continues to be performed at essentially the same complex in Shiremanstown, Pennsylvania.

For all of these reasons, the Arbitrator is asked to sustain the three grievances in question, to direct that the Company apply the terms of the Agreement to the returns work being performed in Shiremanstown by CRW, to direct the Company to make whole all employees who performed such work since August, 1987, and to make the Union whole for the dues and initiation fees which it lost as a result of the Company's improper refusal to apply the terms of the Agreement to the return work performed by CRW in Shiremanstown.

CONTENTIONS OF THE COMPANY

The Union's claim in this case to jurisdiction over all returns work is misplaced and must be rejected by the Arbitrator. The initial transfers of returns work from the Shiremanstown CDC to other warehouse facilities was not grieved. Conversely, the transfer of returns work from the regional distribution centers back to Shiremanstown was not grieved by the Teamster local unions in Rome, Nitro, or Cleveland. Additionally, the transfer of certain presorting of returns to the retail employees of the Company was not challenged by the Union.

To the extent that the Company's actions are found by the Arbitrator to be subcontracting, the grievance must be denied. Article XXX clearly recognized the Company's right to subcontract work in the circumstances of this case where no employee has suffered any job loss or even a reduction in pay. Further, there is no specific job classification for returned goods in the Agreement; rather, the work is handled by pickers. Finally, given the size of the bargaining unit — 467 employees — the loss of two or three or even eight jobs in the bargaining unit is not substantial and certainly cannot be said to undermine the Union's status as the bargaining representative of the CDC employees.

Nor was the transfer motivated by any improper reasons. The Union's own witnesses recognized that the returned goods area in the CDC was too small and that additional space was needed. The transfer coincided with other changes in returns work which also were made for legitimate business reasons.

In reality, what the Union seeks in this grievance is to override the National Labor Relations Act rights of the CRW returns employees and become the exclusive bargaining representative of the CRW returns employees without the need for a representation election. There was no record evidence which would indicate that the returns employees working at CRW are appropriately treated as a separate bargaining units from the unorganized group of cigarette and video WRAC employees, who are admittedly outside of the CDC bargaining unit.

The testimony and the language of the grievances themselves suggest two reasons why the Union has filed these grievances, neither of which has merit. First, a few of the employees who previously worked in the returns area and who were reassigned to other work preferred their prior jobs. The fact remains, however, that no work rule or seniority right is violated by the Company's reassignment of work duties which fell within the employee's classification. The second reason is that the work went "across the street." This fact, however, is irrelevant for purposes of the contractual issues presented to the Arbitrator for decision. Moreover, the Agreement clearly references in the recognition clause the company's Shiremanstown

"operation" (in the singular) and excludes "other warehouse locations" such as CRW.

The Company does not suggest that it has an unlimited right to remove work from the CDC. The Company "acknowledges an obligation to act in good faith; to make reasonable business decisions; to avoid subversion of the labor agreement and to avoid actions which have the effect of seriously weakening the bargaining unit without negotiating and without valid business reasons." (Company Post-Hearing Brief at 6.) None of those implied limitations, however, have been breached in this case and the job security of even a single bargaining unit employee has not been impaired.

For all these reasons, the Arbitrator is asked to deny the grievances in their entirety.

DISCUSSION AND OPINION

The issue presented in this case is whether the assignment of certain returns work previously performed by bargaining unit members at the Company's Shiremanstown, Pennsylvania Central Distribution Center to non-union employees at the Company's Shiremanstown, Pennsylvania Central Returns Warehouse violated the Agreement and, if so, to determine the appropriate remedy.

The initial question contractually is whether the actions of the Company constituted subcontracting within the meaning of Article XXX of the Agreement. After carefully considering all of the circumstances involved in this case, I am persuaded that the Company's transfer of work at issue herein was not "subcontracting."

Applying traditional labor law standards, it is clear that CRW and CDC must be considered as parts of one and the same employer. Like Rack Rite's CDC operations, CRW is fully owned by Rite Aid and is actively engaged in warehousing related work integrally connected with the Rite Aid's operation of its retail drug store business. Labor relations and management control for CRW resides in Rite Aid's labor relations and management personnel. CRW and CDC employees both participate in Rite Aid benefit programs. Applicants for employment at CRW apply to Rite Aid, complete a single application form, and are then diverted by personnel to one or the other

of the two work areas. Checks are issued to both CRW employees and CDC employees on Rite Aid check stock. The day to day supervisor of the returns work at CRW, Mr. Thomas, was employed immediately prior to the creation of CRW as a supervisor in CDC. Mr. Thomas met with experienced bargaining unit returns employees to obtain their input into the development of CRW procedures and into how to properly train the new CRW hires. Significantly, even after August, 1987, returns work has been assigned to either CRW or CDC personnel by Rite Aid supervision, based upon available overall manpower considerations and the priority of pending work. The work performed by CRW employees has been bargaining unit work at the CDC for more than twenty continuous years prior to the creation of CRW and the resultant "transfer" of returns work.

The failure of the Agreement to have a returns job classification is irrelevant to the decision that the returns work transferred from the main building of the CDC to CRW was bargaining unit work. Although none of the individuals who historically performed returns work have any contractual right to claim that particular work assignment, that does not alter the fact that, pursuant to the terms of Article II, the work belongs to the CDC bargaining unit so long as it is performed "at [the Company's] Shiremanstown, Pennsylvania operation" and is not performed by "employees at the Employer's other warehouse locations."

The Company's claim that the reference in Article II to the Shiremanstown, Pennsylvania operation, in the singular, precluded its application to the returns work being performed in the Lehrman building by CRW is rejected for several reasons. First, given the facts in support of single employer status reviewed above, including the high degree of integration functionally of the two operations, and the extremely close geographic proximity of the Lehrman building (which also is in Shiremanstown) to the Company's main distribution center building in Shiremanstown, I am persuaded that the returns work performed by CRW, whether performed in the Lehrman building or in the CDC building or, hypothetically, in a newly built addition to the main distribution center) is part of the Company's Shiremanstown operation. Second, it is interesting to note that the Parties in Article II referenced "the Employer's other

warehouse locations" as well as the Company's Shiremanstown operation. By using the phrase "the Employer's other warehouse locations" despite the separate corporate status of each of the other regional distribution centers, it appears that the Parties recognized that "the Employer" was Rite Aid, notwithstanding the particular corporate subsidiary which was in technical ownership of the particular warehousing location. Even more significantly for purposes of this case, it is clear that the Lehrman Building was *not* a different "location" from the main distribution center building for purposes of Article II. If the Company transferred more substantial portions of the CDC work to the Lehrman building (or other buildings similar in proximity to the main distribution center) for reasons of growth and space, the result from the point of view of the bargaining unit cannot differ simply because economics dictate that they be housed in adjacent separate buildings instead of in a single, larger connected building. Third, there can be no question that, given the history of having the returns work performed by CDC warehouse employees prior to August, 1987, the disputed returns work is work performed by "warehouse employees" of the Company.

I agree with the Union that the Company's motivation in transferring the work to CRW is not dispositive in this case. It should be noted, however, that although the record indicates legitimate business reasons in transferring the work physically to the Lehrman Building for space reasons, no business reason whatsoever was suggested by the Company for its decision to have the work performed by CRW, on a non-union basis, instead of maintaining the prior situation in which the work was performed under the auspices of the CDC and was covered by the Agreement.

The Company's claim that to sustain the grievance in this case would be inconsistent with the National Labor Relations Act since there was no evidence that the CRW returns work was an appropriate separate bargaining unit is rejected. First, I am not persuaded that this Arbitrator needs to determine whether the CRW returns work constituted a separate appropriate bargaining unit in order to resolve this grievance and apply the terms of Article II. The question contractually is not whether the remaining employees in the Lehrman building who work for WRAC could possibly be part of a bargain-

ing unit which included the CRW returns employees, but excluded the CDC employees. Rather, to the extent that appropriate bargaining unit questions impact at all on the application of Article II (an issue which need not be addressed herein), the question, at best, is whether a bargaining unit which included the CRW returns employees with the CDC employees, but excluded the WRAC employees, could be considered an appropriate unit. On the basis of this record, and after consideration of the traditional community of interest standards used by the NLRB in such cases, there is no question in my mind that the answer to the latter question is in the affirmative.

Nor am I persuaded that an Award directing that the Company honor its Agreement with the Union and apply the terms of that Agreement to the returns work being performed at the Lehrman building would violate the Section 7 NLRA rights of any of the unorganized CRW employees. The application of lawful union security provisions (Article III) to newly hired members of a bargaining unit is not a violation of the Section 7 rights of those newly hired employees.

I also agree that there is no prior practice which suggests that Article II should not be applied to cover the transferred returns work in question. The prior situations cited by the Company involving the construction of new regional distribution centers, the movement of certain returns work back from the regional centers to the CDC, and the elimination of certain duties due to the introduction of UPC related equipment in certain stores, all address different issues and are distinguishable.

Nor may the Union's failure to have grieved the creation of the WRAC and the assignment of the cigarette and video warehousing duties to unorganized employees preclude the instant grievance from being considered on its own intrinsic merit. Detailed facts regarding the creation of the WRAC and the history of assignment of cigarette and video warehousing job duties were not fully developed in the record in this case. Nor were the facts developed herein regarding the then physical location of the WRAC operations, its management and supervision, and the like.

The fact that no employees have been laid off to date as a result of the Company's actions cannot save its actions in this case. The Union need not await a substantial diminution of the bargaining unit before being able to insist upon compliance with Article II. The transferred work in this case — which takes 27 CRW employees to perform — cannot be considered *de minimis*. Nor does the fact that the transfer of work coincided with increased centralization of returns work render Article II inapplicable. There certainly was no substantial change in the direction of the Company's business at issue in this case. Rather, what is involved herein is whether, under the circumstances of this case, the Company's transfer of admittedly bargaining unit work one and one-half blocks away to a newly created, wholly owned subsidiary, under common management and control, converted that work to non-bargaining unit work.

Having concluded that the Agreement applied to the returns work performed in the Lehrman Building, the question is presented as to the appropriate remedy. The Union is correct that those employees who "but for" the Company's actions would have received contractual wage rates and benefits should be made whole for the improper Company action. Additionally, those employees who remain employed as of the date of receipt of this Award should be granted seniority in accordance with the Agreement and in accordance with their individual dates of hire and commencement of returns work. The Union's request for a declaration that the Agreement covers the returns work in the Lehrman building currently being performed under the CRW umbrella also is granted. The Union's request for initiation fees and lost dues also appears to have merit and is sustained. In regard to the last item of relief requested, however, to avoid unjust enrichment on the part of the employees, the Company may withhold from any back pay award to eligible employees the amount of membership dues and initiation fees which would have been paid by the employee to the Union (either directly or by means of check-off pursuant to Article IV) had the employee been properly treated as covered by the Agreement.

§7314. Vacating award by court

(a) General rule.—

(1) On application of a party, the court shall vacate an award where:

(i) the court would vacate the award under section 7341 (relating to common law arbitration) if this subchapter were not applicable;

(ii) there was evident partiality by an arbitrator appointed as a neutral or corruption or misconduct in any of the arbitrators prejudicing the rights of any party;

(iii) the arbitrators exceeded their powers;

(iv) the arbitrators refused to postpone the hearing upon good cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 7307 (relating to hearing before arbitrators), as to prejudice substantially the rights of a party; or

(v) there was no agreement to arbitrate and the issue of the existence of an agreement to arbitrate was not adversely determined in proceedings under section 7304 (relating to court proceedings to compel or stay arbitration) and the applicant-party raised the issue of the existence of an agreement to arbitrate at the hearing.

(2) The fact that the relief awarded by the arbitrators was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.

(b) Time limitation.—An application under this section shall be made within 30 days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud, misconduct or other improper means, it shall be made within 30 days after such grounds are known or should have been known to the applicant.

(c) Further hearing.—If the court vacates the award on grounds other than stated in subsection (a)(1)(v), the court may order a rehearing before new arbitrators chosen as prescribed in the agreement to arbitrate. Absent a method prescribed in the agreement to arbitrate, the court shall choose new arbitrators in accordance with section 7305 (relating to appointment of arbitrators by court). If the award is vacated on grounds not affecting the competency of the arbitrators under subsection (a)(1)(i) through (iv), the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with section 7305. The time period within which the agreement requires the original award to be made is applicable to the rehearing and commences from the date of the court order directing a rehearing.

(d) Confirmation of award.—If an application to vacate the award is denied and no application to modify or correct the award is pending, the court shall confirm the award.

1980, Oct. 5, P.L. 693, No. 142, § 501(a), effective in 60 days.